Filed 6/29/09 P. v. Marlenee CA

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH RAY MARLENEE, Defendant and Appellant.	H032398 (Santa Clara County Super.Ct.No. CC779142)

Defendant Joseph Ray Marlenee was convicted after a no contest plea of misdemeanor possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)). Prior to entry of the plea, defendant made an unsuccessful motion to suppress seized evidence pursuant to Penal Code section 1538.5.[1] The court suspended sentencing and granted probation.

Defendant challenges the conviction entered on his no contest plea, contending he was illegally detained while he was a pedestrian; he argues that the later search that resulted in the discovery of the methamphetamine was therefore unlawful. For the reasons below, we conclude that there was no error and, accordingly, will affirm the judgment.

[1] Further statutory references are to the Penal Code unless otherwise stated.

FACTS[2]

On September 7, 2007, San Jose Police Officer Jeffrey Kopp was working the swing shift as a patrol officer in the downtown area of San Jose. He was patrolling the area by himself in a marked car; he was in full uniform. Before going on patrol that day, Officer Kopp had received information that narcotics sales were occurring out of a particular house on Second Street at Virginia. As part of his duties, when he receives such information, he "patrols that area. [He] talk[s] to people, [and] see[s] what's going on." His investigation includes making "basic inquiries" of people on the street.

At about 5:30 in the evening on that date, Officer Kopp observed defendant walking in the alley behind the house on Second Street toward an abandoned parking lot. It was still daylight. The officer made a U-turn on First Street, turned onto Union Street (where defendant was walking), and stopped his car about seven to 10 feet behind him. Officer Kopp did not have his headlights on, and did not signal defendant by, for example, using his amber lights, horn, or megaphone. The officer stopped the car in the roadway, rather than pulling over to the curb.[3] He did not recall whether he left the engine running.

Officer Kopp got out of his patrol car, and walked to the front of it. As he did so, defendant slowed down and looked at him. The officer, in a normal tone of voice, asked defendant (who was about five feet away), " 'Hey, can I talk to you for a sec?' " When he addressed defendant, Officer Kopp had nothing in his hands, such as a baton or gun;

---

[2] The facts are taken from the evidentiary hearing on defendant's motion to suppress. "Since the trial court resolved this matter in favor of the prosecution, for purposes of this proceeding we view the record in the light most favorable to the People's position. In the interest of completeness, however, we note the main points of conflict shown by the record." (*Wilson v. Superior Court* (1983) 34 Cal.3d 777, 780.)

[3] Officer Kopp testified that, although it was 5:30 on a Friday evening, there was minimal traffic in the area.

he did not block defendant's progress, his hands were at his sides, and he made no threatening gestures. Defendant responded, " 'Sure.' "[4]

Officer Kopp asked defendant where he had come from and the name of the person he had just seen and where that person lived. He also asked defendant whether he was on probation or parole. As he asked the questions, the officer observed that defendant "was very nervous and hesitant," his mouth and tongue were very dry, and "his eyelids were fluttering very rapidly." Based on Officer Kopp's training and experience, he believed that defendant was under the influence of an illegal stimulant.[5] He then checked defendant's pulse, which was elevated—giving further support to the officer's belief.[6] The officer asked defendant whether he had anything illegal on his person. Defendant answered that he did not. Officer Kopp asked, " 'Do you mind if I check to make sure?' " The officer then searched defendant—without defendant in any way resisting, arguing or complaining about the search—and found a small plastic bag containing a crystalline substance.[7]

---

[4] Defendant's testimony was that Officer Kopp drove alongside him and motioned for him to stop.

[5] At the time of defendant's arrest, Officer Kopp had been with the force for approximately 10 months. His training and experience in determining whether a person was under the influence of an illegal stimulant included 40 hours of training in the police academy concerning the types of drugs, their appearance, their effects on the human body, and the manner in which drugs are consumed; working with a field training officer for approximately four months, during which he encountered between 20 and 30 people under the influence of illegal stimulants; work in the field on his own in which he had contact with between 40 and 50 people under the influence of illegal stimulants; and being involved in about 20 arrests of persons under the influence of illegal stimulants.

[6] Defendant's lab results demonstrated him to have been presumptively positive for being under the influence of methamphetamine.

[7] According to defendant's testimony, he agreed to be searched for weapons, but did not agree to a search beyond a weapons search.

Defendant testified at the hearing that when Officer Kopp asked to speak with him, he felt that he had to comply. He testified further that when the officer was asking him questions, he did not feel that he was free to leave.

PROCEDURAL BACKGROUND

Defendant was charged by complaint with one felony count, namely, possession of a controlled substance, i.e., methamphetamine (Health & Saf. Code, § 11377, subd. (a)). Defendant filed a motion to suppress evidence pursuant to section 1538.5. The People opposed the motion. After an evidentiary hearing, defendant filed supplemental authorities in support of his suppression motion. On November 6, 2007, the court denied the motion to suppress. In so holding, the court concluded that Officer Kopp was credible and found that "the encounter was entirely consensual and that the officer's actions were lawful."

After the court reduced the charged felony offense to a misdemeanor, defendant pleaded no contest to misdemeanor possession of a controlled substance. The court suspended imposition of the sentence, placed defendant on probation for one year, and suspended imposition of any additional jail time. Defendant filed a timely notice of appeal of the denial of the motion to suppress. The denial of the suppression motion may be challenged by an appeal from the judgment entered after defendant's guilty or no contest plea. (§ 1538.5, subd. (m); *People v. Lilienthal* (1978) 22 Cal.3d 891, 896.)

DISCUSSION

I. *Standard of Review*

"An appellate court's review of a trial court's ruling on a motion to suppress is governed by well-settled principles. [Citations.] [¶] In ruling on such a motion, the trial court (1) finds the historical facts, (2) selects the applicable rule of law, and (3) applies the latter to the former to determine whether the rule of law as applied to the established facts is or is not violated. [Citations.] 'The [trial] court's resolution of each of these

inquiries is, of course, subject to appellate review.' [Citations.] [¶] The court's resolution of the first inquiry, which involves questions of fact, is reviewed under the deferential substantial-evidence standard. [Citations.] Its decision on the second, which is a pure question of law, is scrutinized under the standard of independent review. [Citations.] Finally, its ruling on the third, which is a mixed fact-law question that is however predominantly one of law, . . . is also subject to independent review." (*People v. Williams* (1988) 45 Cal.3d 1268, 1301; see also *People v. Ayala* (2000) 23 Cal.4th 225, 255.) All presumptions favor the trial court's exercise of its power to judge the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence, and draw factual inferences, " 'and the trial court's findings on such matters, whether express or implied, must be upheld if they are supported by substantial evidence.' " (*People v. Leyba* (1981) 29 Cal.3d 591, 596-597, quoting *People v. Lawler* (1973) 9 Cal.3d 156, 160.) And where "the facts are basically undisputed, we independently review the [trial court's] decision . . . ." (*People v. Downing* (1995) 33 Cal.App.4th 1641, 1650, fn. omitted.)

Based upon its factual findings, the trial court has the duty to determine whether "the search was unreasonable within the meaning of the Constitution." (*People v. Lawler, supra*, 9 Cal.3d at p. 160.) This issue is a question of law. Therefore, we must measure the facts, as found by the trial court, against the constitutional standard of reasonableness for the search and/or seizure. (*Ibid.*; *People v. Leyba, supra*, 29 Cal.3d at p. 597.)

Under the California Constitution, article I, section 28, subdivision (d), the reasonableness of the search or seizure is measured against federal constitutional standards. (*People v. Woods* (1999) 21 Cal.4th 668, 674.) Only evidence that is the product of an unreasonable search and seizure in violation of federal standards shall be suppressed. (*In re Lance W.* (1985) 37 Cal.3d 873, 890.)

II. *Detentions of Citizens by Police*

Defendant argues that there was no reasonable suspicion justifying Officer Kopp's detention of him and that therefore the suppression motion should have been granted. The Attorney General contends that the officer did not detain defendant; thus, constitutional principles of search and seizure—including the requirement that an officer have a reasonable suspicion that a citizen being detained is involved in illegal activity—were not applicable. Since the propriety of the court's denial of the motion here turns on the issue of whether the encounter between Officer Kopp and defendant was a consensual one or constituted a detention, we will first review the applicable legal principles.

We note initially that "there are basically three different categories or levels of police 'contacts' or 'interactions' with individuals, ranging from the least to the most intrusive. First, there are . . . 'consensual encounters,' [citation], which are those police-individual interactions which result in no restraint of an individual's liberty whatsoever . . . and which may properly be initiated by police officers even if they lack any 'objective justification.' [Citation.] Second, there are what are commonly termed 'detentions,' seizures of an individual which are strictly limited in duration, scope and purpose . . . . [Citation.] Third, and finally, there are those seizures of an individual which exceed the permissible limits of a detention, seizures which include formal arrests and restraints on an individual's liberty which are comparable to an arrest, and which are constitutionally permissible only if the police have probable cause to arrest the individual for a crime." (*Wilson v. Superior Court, supra,* 34 Cal.3d at p. 784, quoting *Florida v. Royer* (1983) 460 U.S. 491.)

An encounter between police and a private citizen is deemed consensual if the citizen, "as a reasonable person would feel free 'to disregard the police and go about his business.' " (*Florida v. Bostick* (1991) 501 U.S. 429, 434.) "The test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a

whole, rather than to focus on particular details of that conduct in isolation. Moreover, what constitutes a restraint on liberty prompting a person to conclude that he is not free to 'leave' will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs." (*Michigan v. Chesternut* (1988) 486 U.S. 567, 573.)

Thus, the United States Supreme Court has explained consensual encounters with the police—as contrasted with lawful detentions—as follows: "[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen . . . . [Citations.] Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification. [Citation.] The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. [Citations.] He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds." (*Florida v. Royer*, *supra*, 460 U.S. at pp. 497-498; see also *U.S. v. Mendenhall* (1980) 446 U.S. 544, 553: " '[T]here is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets,' [citation]. Police officers enjoy 'the liberty (again, possessed by every citizen) to address questions to other persons' [citation], although 'ordinarily the person addressed has an equal right to ignore his interrogator and walk away.' [Citation.]"

Our high court has noted that "[c]ircumstances establishing a seizure might include any of the following: the presence of several officers, an officer's display of a weapon, some physical touching of the person, or the use of language or of a tone of voice indicating that compliance with the officer's request might be compelled. [Citations.]" (*In re Manuel G.* (1997) 16 Cal.4th 805, 821; see also *In re Christopher B.* (1990) 219

Cal.App.3d 455, 460.) All of the circumstances involved in the encounter must be evaluated to decide whether a reasonable person would have concluded from the police conduct that he or she was not free to leave or decline the requests of the police. (*Florida v. Bostick, supra*, 501 U.S. at p. 439.) And "[t]he officer's uncommunicated state of mind and the individual citizen's subjective belief are irrelevant in assessing whether a seizure triggering Fourth Amendment scrutiny has occurred." (*In re Manuel G., supra*, at p. 821.)

III. *Denial of the Motion to Suppress*

The evidence presented at the hearing supported the court's finding that the encounter between Officer Kopp and defendant was consensual. The manner in which the officer approached defendant was not coercive. Officer Kopp did not make any overt demonstrations of authority, such as using his patrol car's flashing lights, horn, loudspeaker system, or other means of getting defendant's attention. The officer did not approach defendant in a quick or menacing manner—his hands were at his sides and he did not have anything (such as a firearm or baton) in them. Officer Kopp made no threatening gestures, made no demands, and did not block defendant's progress. (See *People v. Franklin* (1987) 192 Cal.App.3d 935 [finding no detention, noting that officer did not block the defendant's way and made no demands upon him].) Rather, he simply asked defendant in a normal tone of voice, " 'Hey, can I talk to you for a sec?' " Defendant responded, " 'Sure.' "

The encounter thus had none of the circumstances of a potential "seizure" identified by our high court, i.e., "the presence of several officers, an officer's display of a weapon, some physical touching of the person, or the use of language or of a tone of voice indicating that compliance with the officer's request might be compelled. [Citations.]" (*In re Manuel G., supra*, 16 Cal.4th at p. 821.) Therefore, from the testimony of Officer Kopp—whom the court found to be credible (a finding not subject to

review)—the conclusion was proper that the encounter was consensual, i.e., the circumstances were such that a citizen, "as a reasonable person would feel free 'to disregard the police and go about his business.' " (*Florida v. Bostick*, *supra*, 501 U.S. at p. 434.)

Defendant, however, argues that "the urgent and aggressive manner of [Officer Kopp's] approach" was indicative of a detention. He relies in large part on *People v. Jones* (1991) 228 Cal.App.3d 519 (*Jones*) in support of that position. Defendant's contention is without merit.

In *Jones*, the officer made contact with defendant at approximately 9:00 p.m. on an Oakland street after observing the defendant—who was with two other men—receive money from one of them. (*Jones*, *supra*, 228 Cal.App.3d at p. 521.) Because the area was known to the officer as a high drug trafficking region, the officer notified the dispatcher that he was going to make a " 'walking stop'; he then pulled his patrol car to the wrong side of the road and parked diagonally against the traffic about 10 feet behind the group." (*Id.* at p. 522.) After the defendant began to walk away, the officer said something to the effect of " ' "Stop. Would you please stop." ' " (*Ibid.*) The defendant stopped, and then " 'immediately' reached towards his left-rear pants pocket with his left hand." (*Ibid.*) Fearing that the defendant might have a concealed weapon, the officer grabbed his left arm; the defendant's fingers were in his left rear pocket and the officer withdrew the defendant's hand and observed that he was holding a clear plastic bag containing cocaine. (*Ibid.*) In response to the officer's query, the defendant said that he thought the bag contained methamphetamine. (*Ibid.*) The officer then arrested the defendant for possession of cocaine for sale. (*Ibid.*)

In reviewing the prosecution's appeal from an order granting the defendant's motion to suppress, the *Jones* court concluded that the combination of the officer's quick arrival to the scene and his direction that the defendant stop constituted a detention. It

reasoned, "We believe the coercive effect of [the officer's] conduct was clear. A reasonable man does not believe he is free to leave when directed to stop by a police officer who has arrived suddenly and parked his car in such a way as to obstruct traffic." (*Jones, supra*, 228 Cal.App.3d at p. 523.)

We disagree with defendant's claim that Officer Kopp stopped his patrol car in a manner identical to that in *Jones*. Here, in contrast to *Jones*, the record does not demonstrate that Officer Kopp "arrived suddenly" or "parked his car in such a way as to obstruct traffic." (*Jones, supra*, 228 Cal.App.3d at p. 523.) There is no indication that the officer's arrival was "sudden." And although he did not pull his patrol car over to the curb when he stopped, Officer Kopp testified that there was no traffic at the time and he was uncertain whether Union Street was a one-way or two-way thoroughfare. And in contrast to the circumstances in *Jones*, here, Officer Kopp did not direct defendant to stop. Instead, in a normal tone of voice, he said, " 'Hey, can I talk to you for a sec?' " These words, viewed in the context in which they were spoken, were reasonably those of a peace officer making a request that a citizen voluntarily cooperate in speaking with the officer for a moment. Moreover, the belief of defendant that he felt compelled to cooperate with Officer Kopp—assuming defendant's testimony is credited[8]—is of no consequence. The defendant's subjective belief as a citizen encountering a peace officer as to whether he or she was compelled to cooperate is irrelevant in testing whether a reasonable person would have thought under the circumstances that he or she was free to go about his or her business. (*In re Manuel G.*, *supra*, 16 Cal.4th at p. 821.)

---

[8] The record does not disclose whether the court found credible defendant's testimony that he felt compelled to speak with Officer Kopp. Accordingly, while that testimony is not germane to determining whether there was a detention, the trial court, in any event, could have disregarded it as not credible, a finding that we of course would not disturb. (*People v. Leyba*, *supra*, 29 Cal.3d at p. 596.)

Defendant's reliance on *People v. Garry* (2007) 156 Cal.App.4th 1100 (*Garry*) is likewise misplaced. There, the defendant, who, at approximately 11:30 in the evening, was standing next to a car in "a high-crime, high-drug area [of Vallejo] where illegal street drugs were often sold" (*id.* at p. 1103), was approached by a uniformed officer who arrived in a marked patrol car. The officer activated the spotlight of his patrol car to illuminate the defendant. (*Id.* at p. 1104.) The officer—who was approximately 35 feet from the defendant—observed that he appeared nervous. The officer then "started walking 'briskly' toward him, and [the] defendant '[w]ith a look of kind of nervousness and shock, he started, like, walking backwards . . . and he spontaneously stated, "I live right there," and he pointed to a house on his right.' [The officer] continued to walk toward [the] defendant, said, 'Okay, I just want to confirm that,' and asked [the] defendant if he was on probation or parole." (*Ibid.*) After the defendant responded in the affirmative, the officer decided he would detain the defendant; he asked him whether he had any weapons on his person, and he said he did not. (*Ibid.*) Shortly afterward, the officer reached out and grabbed the defendant, who "started to pull away 'violently.' " (*Ibid.*) The officer placed him into an arm-shoulder lock, took him to the ground, and handcuffed him. (*Ibid.*) In a search incident to the arrest, the officer located 13 individually wrapped pieces of rock cocaine. (*Ibid.*)

Under these circumstances, the court reversed the lower court's denial of the defendant's suppression motion. (*Garry*, *supra*, 156 Cal.App.4th at p. 1113.) The court reviewed of a number of California cases considering individual circumstances from which a finding that either a detention or a consensual encounter occurred. (*Id.* at pp. 1107-1111.) After noting that the determination of the existence of a detention, under *In re Manuel G.*, *supra*, 16 Cal.4th at pages 821 to 822, requires consideration of all of the surrounding circumstances (*Garry*, *supra*, at p. 1110), the court emphasized that this included "an examination of both an officer's verbal *and* non-verbal actions in order to

'assess[ ] the coercive effect of police conduct as a whole, rather than emphasizing particular details of that conduct in isolation.' [Citation.]" (*Ibid.*, quoting *In re Manuel G., supra,* at p. 821.) Having said this, the court observed that "an officer's words and verbal tones are always considered. [Citations.] However, these cases also place great significance on how the officers physically approach their subjects. [Citations.] Furthermore, while cases have not found the use of a spotlight alone to constitute a detention [citations], they also indicate its use should be considered in determining whether there was a show of authority sufficient to establish one occurred." (*Garry, supra,* at pp. 1110-1111.) The court ultimately held that the officer's "actions constituted a show of authority so intimidating as to communicate to any reasonable person that he or she was ' "not free to decline [his] requests or otherwise terminate the encounter." ' [Citation.]" (*Id.* at p. 1112.)

In contrast to *Garry*, here the officer neither shone his patrol car's spotlight on defendant, nor approached him rapidly. He did not otherwise physically coerce defendant to act in a certain manner. In short, Officer Kopp in no way either through verbal or nonverbal conduct made a showing of authority sufficient to support a conclusion that defendant was being detained. Accordingly, we conclude that the court below properly found that the encounter was consensual. Officer Kopp learned of facts during the consensual encounter that established probable cause for defendant's arrest—i.e,, multiple objective signs exhibited by defendant that he was under the influence of a controlled substance. The officer's subsequent search (to which defendant did not object) yielding the contraband was lawful.[9] The court properly denied defendant's motion to suppress.[10]

---

[9] As noted, defendant's appeal is based on the assertion that the encounter with Officer Kopp was a detention and that therefore anything learned by the officer subsequently, including signs that defendant was under the influence and that he

DISPOSITION

The judgment is affirmed.

Duffy, J.

I CONCUR:

Elia, Acting P.J.

Bamattre-Manoukian, J.

possessed methamphetamine, was the product of an illegal search and seizure. Thus, except for the argument that the encounter was not consensual (and the contraband obtained in the subsequent search must therefore be suppressed because the officer had no reasonable suspicion to detain defendant), defendant does not otherwise challenge the officer's conclusion that defendant was under the influence or the subsequent search of his person that yielded the methamphetamine.

10 Defendant also argues that the court erred in sustaining the prosecution's objections to defense questions regarding whether Officer Kopp specifically informed defendant that he was free to leave and that he was not required to speak with the officer. The Attorney General does not respond to this assertion. Although there was no requirement that Officer Kopp inform defendant that he was free to leave, whether or not he did so arguably would have been relevant to the issues considered in the motion to suppress. Assuming arguendo that the court abused its discretion by excluding this evidence, any error was not prejudicial. Even were the objections to defense counsel's questions overruled and the officer had responded that he did not inform defendant that he was free to leave and did not have to speak with the officer, these assumed facts would not change the conclusion that the encounter was indeed consensual.